

Introduction

American business thrives on competition. U.S. companies and workers can compete with the best in the global marketplace because of their drive, innovation, and superior products and services. But their success depends heavily on their ability to compete on a level playing field. Bribery and corruption tilt the playing field and create unfair advantages for those willing to engage in unethical and illegal practices. These practices penalize companies that play fair and seek to win contracts through the quality and price of their products and services. Bribery and corruption have other damaging effects as well: undermining good governance, impeding economic development, and distorting world trade. It was because of these concerns and a shared desire to promote fair competition in the global marketplace that the Clinton Administration and Congress worked together to enact the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) and bring into effect the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. (See Appendixes A and B.) The Convention was negotiated by the major industrial nations, working within the Organization for Economic Cooperation and Development (OECD).

The IAFCA amended the Securities Exchange Act of 1934 and the Foreign Corrupt Practices Act of 1977 (FCPA), bringing U.S. law into conformity with the obligations of the United States under the Convention. Pas-

sage of the IAFCA enabled the United States to ratify the Convention on November 20, 1998, and deposit its instrument of ratification with the OECD on December 8, 1998. (The Convention entered into force on February 15, 1999, for the twelve countries that had deposited instruments of ratification with the OECD.) The IAFCA also addressed Congressional concerns regarding privileges and immunities for international organizations providing satellite communications services that may affect fair competition in the satellite industry.

U.S. Leadership on the Convention

The successful negotiation of the Convention is a major step forward in developing an international consensus on fighting bribery and corruption. The United States launched its own campaign against international corrupt practices more than twenty years ago with passage of the FCPA. The law established substantial penalties for persons making payments to foreign government officials, political parties, and candidates for public office to obtain or retain business. Enactment of the legislation reflected deep concern among a broad spectrum of the American public about the involvement of U.S. companies in unethical business practices. Disclosures in the 1970s indicated that U.S. companies spent millions of dollars to bribe foreign public officials and

thereby gain unfair advantage in competing for major commercial contracts overseas. These practices not only damaged the reputation of American companies throughout the world but also undermined efforts to promote good governance and sound business practices in the countries where foreign public officials were bribed.

The FCPA has had a major impact on how U.S. companies conduct business overseas. However, in the absence of similar legal prohibitions by key trading partners, U.S. businesses were put at a significant disadvantage in international commerce. Their foreign competitors continued to pay bribes without fear of penalties, resulting in billions of dollars in lost sales to U.S. exporters and the continuation of a pernicious practice that harmed governments and societies, most often in developing countries that could least afford the costs.

Recognizing that bribery and corruption in foreign commerce could be effectively addressed only through strong international cooperation, the United States undertook a long-term effort to convince the leading industrial nations to join it in passing laws to criminalize the bribery of foreign public officials. The Omnibus Trade and Competitiveness Act of 1988 reaffirmed this goal, calling on the U.S. government to negotiate an agreement in the OECD on the prohibition of overseas bribes. After nearly ten years, the effort succeeded. On November 21, 1997, the United States and thirty-three other nations adopted the Convention. It was signed on December 17, 1997. All signatories to the Convention also agreed to implement the OECD's recommendation on eliminating the tax deductibility of bribes. (See the Recommendation of the OECD Council on the Tax Deductibility of Bribes to Foreign Public Officials, in Appendix B.)

The Convention entered into force on February 15, 1999, following the deposit of instruments of ratification with the OECD by the United States and eleven other signatory countries. Austria, Mexico, and Sweden deposited their instruments of ratification with the OECD on May 20, May 27, and June 8, 1999, respectively. The Convention enters into force for Austria, Mexico, and Sweden sixty days after their respective dates of deposit. As of June 10, 1999, no other signatories had deposited instruments with the OECD. In most of the remaining signatory countries, legislative bodies are now reviewing proposals to ratify and implement the Convention. For many, this process should be completed by the end of 1999.

Major Provisions of the Convention

The Convention obligates the parties to criminalize bribery of foreign public officials in the conduct of inter-

national business. It is aimed at proscribing the activities of those who offer, promise, or pay a bribe. For this reason the Convention is often characterized as a "supply side" agreement, as it seeks to effect changes in the conduct of companies in exporting nations and not to penalize the bribe recipient.

The definition of "foreign public official" covers many individuals exercising public functions, including officials of public international organizations. It also captures business-related bribes to such officials made through intermediaries and bribes that corrupt officials direct to third parties. The Convention further requires that the parties, among other things:

- Apply "effective, proportionate, and dissuasive criminal penalties" to those who bribe and provide for the ability to seize or confiscate the bribe and bribe proceeds (i.e., net profit) or property of similar value.
- Establish liability of legal persons (e.g., corporations) for bribery and impose effective, proportionate, and dissuasive sanctions, including monetary penalties.
- Make bribery of a foreign public official a predicate offense for purposes of money laundering legislation on the same terms as bribery of domestic public officials.
- Take necessary measures regarding accounting practices to prohibit the establishment of off-the-books accounts and similar practices for the purpose of bribing or hiding the bribery of foreign public officials.
- Provide mutual legal assistance to the fullest extent possible under their respective laws for the purpose of criminal investigations and proceedings under the Convention and make bribery of foreign public officials an extraditable offense.

The Convention tracks the FCPA closely in many important respects. Unlike the FCPA, however, it does not cover bribes to political parties, party officials, and candidates for public office. The United States is urging signatories to strengthen the Convention by including these individuals and organizations in the definition of foreign public official.

Reporting and Monitoring Requirements

Section 6 of the IAFCA provides that not later than July 1, 1999, and July 1 of each of the five succeeding years, the Secretary of Commerce shall submit to the House of Representatives and the Senate a report on implementation of the Convention by other signatories and on certain matters relating to international satellite

organizations addressed in the IAFCA. The IAFCA requests information in the following areas related to the Convention and antibribery issues:

- The status of ratification and/or entry into force for signatory countries.
- A description of domestic implementing legislation and an assessment of the compatibility of those laws with the Convention.
- An assessment of the measures taken by each party to fulfill its obligations under the Convention, including an assessment of the enforcement of the legislation implementing the Convention; efforts to promote public awareness of those laws; and the effectiveness, transparency, and viability of the monitoring process for the Convention, including its inclusion of input from the private sector and nongovernmental organizations.
- An explanation of the laws enacted by each signatory to prohibit the tax deduction of bribes.
- A description of efforts to add new signatories and to ensure that all countries that become members of the OECD are also parties to the Convention.
- An assessment of the status of efforts to strengthen the Convention by extending its prohibitions to cover bribes to political parties, party officials, and candidates for political office.
- An assessment of antibribery programs and transparency with respect to certain international organizations.
- A description of the steps taken to ensure full involvement of U.S. private sector participants and representatives of nongovernmental organizations in the monitoring and implementation of the Convention.
- A list of additional means for enlarging the scope of the Convention and otherwise increasing its effectiveness.

In addition, the IAFCA requests the following information with regard to international satellite organizations:

- A list of advantages, in terms of immunities, market access, or otherwise, in the countries or regions served by certain international satellite organizations; the reason for such advantages; and an assessment of progress toward fulfilling the policy described in Section 5 of the IAFCA.

The Senate, in its July 31, 1998, resolution giving advice and consent to ratification of the Convention, requested that the President submit a similar report on enforcement and monitoring of the Convention to the Senate Committee on Foreign Relations and the Speaker of the House of Representatives. The President delegated

responsibility for this report to the Secretary of State. In light of the similarity of the reporting requirements, the Commerce and State Departments have worked together, in close coordination with the Justice and Treasury Departments, the Securities and Exchange Commission, and the Office of the U.S. Trade Representative, to prepare the two reports.

The Monitoring Effort

The U.S. government has established a program to monitor implementation of the Convention and encourage effective action against bribery and corruption by trading partners around the world. This effort includes regular contacts with the business community and nongovernmental organizations, dissemination of information about the Convention and antibribery legislation over the Internet, and other initiatives to promote international cooperation in combating these harmful practices. The IAFCA's Congressional mandate to prepare annual reports has helped to strengthen the United States' internal monitoring process. It has encouraged U.S. agencies to focus on issues of specific interest to Congress and promoted a more intensive team approach to monitoring. More detailed information on monitoring is provided in Chapter 3.

In addition to the internal U.S. government monitoring, U.S. officials are also taking part in the OECD process for monitoring implementation of the Convention. The OECD Working Group on Bribery in International Business Transactions is conducting a systematic review of measures taken by signatory countries to carry out their obligations under the Convention. In the first phase of this review, the Working Group is examining national implementing legislation to assess whether it conforms to the requirements of the Convention. In the second phase, the Working Group will conduct on-site visits and meet with government, private sector, and nongovernmental organizations to assess steps that parties are taking to enforce their antibribery legislation and fulfill other obligations under the Convention.

U.S. officials are participating actively in this Working Group and other forums in which the Convention is discussed. The United States is encouraged by the seriousness with which other signatories are approaching the tasks associated the first phase of the OECD review and by the concrete steps many have taken to make bribery of foreign public officials illegal under their domestic laws. All signatories to the Convention have an interest in assuring that its provisions are enforced vigorously by all parties. The active engagement of other signato-

ries, the private sector, and nongovernmental organizations will be essential to the success of the Convention.

The Secretary of Commerce's report to Congress addresses all of the areas specified in Section 6 of the IAFCA. Even though the Convention has been in effect less than five months, the United States has been able to assess the national legislation of eleven other parties and obtain useful information on their implementation of the Convention. Future reports are expected to provide more extensive information as additional signatory countries enact implementing legislation, ratify the Convention, and begin enforcing their antibribery laws. Assessing implementation is a complex undertaking that requires a good understanding of a foreign government's body of laws, enforcement regimes, and policies. To the extent that resources permit, the United States will seek to expand contacts with key countries in the coming year to obtain more detailed information on relevant laws and gain a better understanding of them through discussions with country experts.

Long-Term Commitment to Fighting Bribery and Achieving Fair Competition

After more than twenty years of effort, the United States is finally making real progress in building an international coalition to fight bribery and level the playing field for businesses to compete in the global marketplace. There is now greater recognition of the pernicious effects of bribery in international business transactions and a broader consensus on the need to take corrective action. Adoption of the Convention by thirty-four industrial countries represents an important and historic achievement.

However, much work remains to be done in order to ensure that the Convention becomes an effective instrument for eliminating bribery in international commerce. The majority of signatories have yet to bring their laws into conformity with the Convention. Most countries have had little experience with enforcing international bribery laws. Many foreign companies are only beginning to adjust their internal policies to the new legal standards on bribery. Achieving the goals of the Convention will take time.

To facilitate and expedite this process, the United States has established a solid framework within the federal government and, in cooperation with other signatories, within the OECD for monitoring progress on implementation and enforcement of the Convention. The Clinton Administration is committed to make these efforts pro-

duce results and looks forward to keeping in close contact with Congress, the business community, and interested nongovernmental organizations.